RECENT DECISIONS.

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AGENCY—CARRIERS—BILLS OF LADING.—An agent issued a bill of lading to a consignor who had not delivered any goods, and the evidence showed that the consignee had notice that the recital as to the delivery was false. *Held,* that the consignee could not recover. *Williams* v. *Delaware and Hudson Co.* (App. Div. 1913) 141 N. Y. Supp. 606.

The prevailing view taken by the U. S. Supreme Court and many state courts, following a similar English adjudication, is that since the issuance of a bill of lading by an agent who has not received the goods specified therein is totally unauthorized, the act is not binding on the principal. *Friedlander* v. *Texas Ry.* (1889) 130 U. S. 416; *Lazard* v. *Merchants' and Miners' Co.* (1893) 78 Md. 1; *Grant* v. *Norway* (1851) 10 C. B. 665. Although everyone knows of this limitation upon the agent's authority, see *Natl. Bank of Commerce* v. *Chicago Ry.* (1890) 44 Minn. 224, 233, no third person save perhaps the consignor can ascertain the existence of the fact upon which the agent's authority is conditioned. *Bank of Batavia* v. *N. Y. R. R.* (1887) 106 N. Y. 195. Since the principal must have realized this, and since he has necessarily directed the agent to assert whether or not such fact exists, see *Credit Co.* v. *Howe Co.* (1886) 54 Conn. 357, 387, there is some justification for allowing the agent's representation to estop the principal. *Cf. St. Louis R. R.* v. *Larned* (1882) 103 Ill. 293; *Brooke* v. *N. Y. R. R.* (1885) 108 Pa. 529. Moreover, inasmuch as the third person can secure no information from the principal, and must accept the recital of the bill of lading if he is to do business at all, there is not that consent to his own injury which ordinarily confronts a person who has chosen to contract with an agent without ascertaining his authority. The New York rule, *Armour* v. *Michigan R. R.* (1875) 65 N. Y. 111, which invokes an estoppel in such a case, commends itself as the more expedient, see Williston, Sales 719, and is now fortified by statute, see New York Per. Prop. Law § 209, which imposes the same qualification as the principal case: that in order to avail oneself of the rule it is essential that one should have relied upon the representation.

BANKRUPTCY—INSURANCE—RIGHT OF TRUSTEE IN LIFE POLICIES OF BANKRUPT.—The insured assigned to a firm, of which he was a member, policies on his life payable to his personal representatives. The policies were later assigned by the firm to the insurer as security for a loan equal to their cash surrender value, and within two months of the filing of an involuntary petition in bankruptcy against the partnership the policies were again assigned by it to the defendant subject to the first assignment. The insured died, following the appointment of the trustees, and the latter brought suit against the defendant for the amount realized from the policies, attacking the second assignment as preferential. *Held,* recovery should be denied. *Burlingham* v. *Crouse* (1913) 228 U. S. 459. See Notes, p. 625.

BANKRUPTCY—PREFERENCES—RIGHTS OF VENDOR UNDER CONDITIONAL SALE.—A vendor, under an unrecorded conditional sale, retook the goods within four months before the bankruptcy, knowing of the vendee's insolvency. In an action by the trustee, *held,* the retaking was not a preferential transfer. *Hart* v. *Emmerson Brantingham Co.* (D. C. Mo. 1913) 203 Fed. 60.

Wherever the filing of a chattel mortgage is required by law, as in the jurisdiction of the principal case, (1909) Rev. Stat. of Mo. § 2861, and such an instrument is recorded within four months of the bankruptcy, it will constitute a voidable preference, no matter when the mortgage was executed. *In re Beckhaus* (C. C. A. 1910) 177 Fed. 141, under the amendment of 1903 to § 60a, U. S. Bank. Act, 1898, referring such transactions to the date of recording. *Loeser* v. *Sav. Bank* (C. C. A. 1906) 148 Fed. 975. A chattel mortgage, however, represents a transfer of property, the title to which was originally in the mortgagor, and inasmuch as he retains the possession, is a vehicle of fraud. A conditional sale, on the other hand, whether in the ordinary form or disguised as a sale with mortgage back, *In re Rutland Perry Co.* (D. C. 1913) 205 Fed. 200, leaves the vendor's rights paramount; *Hineman* v. *Matthews* (1890) 138 Pa. 204; and this is so even under the recording acts, unless third parties have gained specific liens. Burdick, Sales (3rd ed.) 221, 222. The conditional vendor, therefore, cannot be classed as a creditor of the bankrupt as regards the specific chattel involved, see *Bradley, Clark & Co.* v. *Benson* (1904) 93 Minn. 91, 96; 1 Remington, Bankruptcy 738, although upon condition broken he may elect to assume the status of a creditor by exercising his option of suing for the value. See Tiffany, Sales (2nd ed.) 139. Consequently, as a preference is predicated only of creditors under the statute, U. S. Bank. Act, 1898, § 60a; *In re Kayser* (C. C. A. 1910) 177 Fed. 383, the principal case logically held the return of the chattel was valid. But see U. S. Bank. Act, 1898, § 47a, as amended 1910; 13 COLUMBIA LAW REVIEW 158.

BANKS AND BANKING—CERTIFICATION—EFFECT.—The payee of a check procured its certification. Upon the payee's insolvency the drawer, who desired to set off a deposit with the payee against the amount of the check, informed the drawee not to honor it. *Held,* one judge dissenting, the payee cannot recover on the certification. *Carnegie Trust Co.* v. *First Nat. Bank* (1913) 141 N. Y. Supp. 745.

A failure to distinguish between certification at the request of the drawer, and certification at the request of the holder, has led courts into the error of holding that if a certification is made by mistake it is at all times revocable, in the absence of an estoppel. *Irving Bank* v. *Wetherald* (1867) 36 N. Y. 335; *Second Nat. Bank of Baltimore* v. *Western Nat. Bank* (1878) 51 Md. 128. In the first case certification is made by the bank to facilitate the drawer's negotiation of the check; it is only a representation that the drawer's signature is genuine, and that he has a sufficient deposit with the drawee which will be set aside for the payment of the check. Therefore, where the certification has been made by mistake, the bank may recall it if the rights of third parties have not intervened. But certification at the request of the payee, at common law and under the Negotiable Instruments Act, releases the drawer, *Continental Nat. Bank* v. *Cornhauser* (1890) 37 Ill. App. 475; *cf. Davenport* v. *Palmer* (1912) 137 N. Y. Supp. 796; Laws of New York 1909, ch. 43, 324; Uniform

Negotiable Instruments Law § 188, and establishes the relation of debtor and creditor between the depositary and the holder. *Metropolitan Nat. Bank* v. *Jones* (1891) 137 Ill. 634; see *Born* v. *First Nat. Bank* (1889) 123 Ind. 78. Funds to the amount of the check are thereby transferred from the drawer's to the payee's control, *Minot* v. *Russ* (1892) 156 Mass. 458; *Girard Bank* v. *Bank of Penn Township* (1861) 39 Pa. 92, and the former's power to countermand ceases. *Freund* v. *Importers & Traders Nat. Bank* (1879) 76 N. Y. 352; *Times Square Automobile Co.* v. *Rutherford Nat. Bank* (1909) 77 N. J. L. 649. Therefore the court in the principal case erred in allowing the certification to be recalled. See *First Nat. Bank* v. *Leach* (1873) 52 N. Y. 350; *Times Square Automobile Co.* v. *Rutherford Nat. Bank, supra.*

CONFLICT OF LAWS—LIMITATION OF CARRIER'S LIABILITY—VALIDITY.—The plaintiff was injured in Oklahoma while riding from Kansas on a pass containing a stipulation against liability on the part of the defendant carrier. This provision was void by statute in Kansas where the pass was given, but valid in Oklahoma. *Held,* the Oklahoma law governed. *Atchison, Topeka & Santa Fé Ry. Co.* v. *Smith* (Okla. 1913) 132 Pac. 494. See Notes, p. 637.

CORPORATIONS—NOTICE TO BANK IMPUTED TO ITS OFFICERS IN PRIVATE CAPACITY.—The defendant delivered a promissory note to the payee bank, which indorsed it to the plaintiff, a director, as to a private individual, for value, before maturity and without actual notice. In an action to recover the security, the defendant set up absence of consideration. *Held,* two judges dissenting, under the Negotiable Instruments Law the plaintiff took subject to the defenses available against the bank. *McCarty* v. *Kepreta* (N. Dak. 1913) 139 N. W. 992.

Unlike the imputation to a corporation of the knowledge of its officers, see 9 COLUMBIA LAW REVIEW 730, the imputation to individuals in a private capacity of knowledge which they are presumed to have in a corporate capacity is not governed by a definite rule. Although the presumption of knowledge in a director is, in reality, a substantive rule of liability, notwithstanding lack of knowledge, *cf.* Wigmore, Evidence § 2492, some courts have been inclined to hold it as effective against him in a private capacity, see *Lyman* v. *Bank of the U. S.* (1851) 12 How. 225; *Merchants' Bank* v. *Rudolf* (1877) 5 Neb. 527; *Gillet* v. *Phillips* (1855) 13 N. Y. 114; Morse, Banks & Banking § 137, as actual knowledge acquired officially would be. *Lancaster* v. *Collins* (1881) 7 Fed. 338. Undoubtedly, the belief that any other holding would open the way to fraud, especially in banking institutions, has influenced these decisions. But, while the presumption of knowledge is very properly enforced against a director or other officer to a full liability in his official capacity, *Savings Bank* v. *Wulfekuhler* (1877) 19 Kan. 60, the better view would seem to be that the presumption, conclusive in a corporate capacity, *In re Newcastle-upon-Tyne Marine Ins. Co.* (1854) 19 Beav. 97, should be rebuttable when applied to circumstances involving only a private capacity. *Proctor* v. *Baldwin* (1882) 82 Ind. 370; *cf. Iowa Nat. Bank* v. *Sherman* (1903) 17 S. Dak. 396. The principal case, therefore, while in accord with the trend of authority before the Act, would seem to be an unwarranted disregard of the terms of that statute in regard to notice. § 6354 R. C. 1905 N. Dak.

CORPORATIONS—REFORMATION OF BOOKS—FRAUD UPON INDIVIDUAL STOCKHOLDER.—The defendant contracted with the plaintiff, both being stockholders of a corporation, to buy his stock according to its book value upon the happening of a certain event. The defendant and his son, who constituted a majority of the board of directors, fraudulently reduced the book value of the corporation's assets. The plaintiff brought a bill in equity to reform the books, joining the corporation as defendant. *Held,* on demurrer, the complaint did not state a cause of action. *Drucklieb* v. *S. H. Harris Inc.* (1913) 209 N. Y. 211, reversing 155 App. Div. 83.

For a discussion of this case in the court below, see 13 COLUMBIA LAW REVIEW 348.

CRIMINAL LAW—BRIBERY—BENEFIT TO THIRD PARTY.—The defendant, while City Chamberlain, induced one R to lend money to a third party under threats of removing the city funds on deposit in R's bank. *Held,* the defendant could not be convicted of receiving a bribe, in absence of proof that he had benefited in some fashion through R's loan to the third party. *People* v. *Hyde* (App. Div. 1913) 141 N. Y. Supp. 1089.

The common law definition of bribery required that the bribe be something of value, 1 Hawkins P. C. (Curw. ed.) 414-15, 1-3; 2 Bishop, New Criminal Law (8th ed.) 51, and this concept prevails universally to-day, *People ex rel. Dickinson* v. *Van de Carr* (N. Y. 1903) 87 App. Div. 386; *Dishon* v. *Smith* (1859) 10 Ia. 212, 221; *Commonwealth* v. *Callaghan* (1825) 2 Va. Cas. 460, despite the disjunctive form of the statute which penalizes the receiving of "a bribe or anything of value". N. Y. Penal Code § 372. See *People ex rel. Dickinson* v. *Van de Carr, supra.* "Food and drink of small value" cannot be the subject-matter of a bribe, 1 Hawkins P. C. 414; *Randell* v. *Evening News Assn.* (1893) 97 Mich. 136, but with this exception the amount of value is immaterial. *Watson* v. *State* (1883) 39 Oh. St. 123. A promissory note which is unenforcible because of the illegality of the consideration is sufficient within the statutes, as a promise of something of value, *People* v. *Willis* (N. Y. 1898) 24 Misc. 549; N. Y. Penal Code § 372, although it is not of itself a thing of value. *State* v. *Walls* (1876) 54 Ind. 561; but see *Commonwealth* v. *Donovan* (1898) 170 Mass. 228. On proof that a benefit to a third party was also a benefit to him who requested the act, there would be no hesitation in convicting, see *State ex rel. Church* v. *Dustin* (1875) 5 Ore. 375, and an inference to this effect, drawn from the mere fact of the request, is sufficient to justify a magistrate's holding the accused for the grand jury. *People ex rel. Dickinson* v. *Van de Carr, supra.* Such an inference, however, will not suffice to make out a case of bribery for the purpose of removing an officer, *People ex rel. Church* v. *Dustin, supra;* but see *State ex rel. Newell* v. *Purdy* (1874) 36 Wis. 213, and clearly cannot take the place of proof beyond reasonable doubt in order to sustain a conviction.

CRIMINAL LAW—STARE DECISIS.—The defendant, in answering a bill demanding the forfeiture of its charter because of its violation of a criminal statute which had already been declared valid by the court, set up the unconstitutionality of the statute as a defense. *Held,* the defense was good. *State ex rel. Pitts* v. *Nashville Baseball Club* (Tenn. 1913) 154 S. W. 1151.

The value of the doctrine of *stare decisis* in securing the stability so necessary to a successful administration of law has long been recognized. Cooley, Constitutional Limitations (7th ed.) 88; *Wilkins* v. *St. Louis R. R.* (1903) 110 Tenn. 422. It rests, however, primarily on reasons of public policy, see *Mason* v. *Cotton Co.* (1908) 148 N. C. 492; *Willis* v. *Owen* (1875) 43 Tex. 41, and consequently should not be invoked to subvert public interest. Hence the courts have not hesitated to overrule a clearly erroneous decision, when no property rights were to be affected by their action. *Paul* v. *Davis* (1884) 100 Ind. 422; Black, Law of Judicial Precedents 199. This view would seem particularly applicable to criminal law, 1 Bishop, New Criminal Law (8th ed.) §§ 94-98, although when the error in the former decision was to the defendant's advantage the propriety of overruling it and thus giving the decision an *ex post facto* color has been denied. *People* v. *Tompkins* (1906) 186 N. Y. 413. This view is doubtless sound when crimes *mala prohibita* are the subject of the decisions, but it is at least an open question in respect to crimes *mala in se,* in view of the argument that an individual should not, by reason of the moral turpitude involved in his conduct, be given a vested right in an erroneous decision. *Lanier* v. *State* (1879) 57 Miss. 102; see *State* v. *Williams* (1880) 13 S. C. 546; *contra, People* v. *Tompkins, supra.* When, however, the reversal is to the defendant's advantage, as in the principal case, even the *ex post facto* argument does not apply, and the injustice of allowing the erroneous decision to stand can scarcely be open to doubt.

CRIMINAL LAW—VENUE—DECREE OF PROOF.—The trial judge in a criminal prosecution failed to charge the jury that venue must be proved, and what *quantum* of proof was necessary. *Held,* that a preponderance of evidence is sufficient to prove venue. *Norris* v. *State* (Tenn. 1913) 155 S. W. 165.

Many courts have taken the view that the averment that the crime had been committed in the county or district in which the defendant was tried must, like every other material allegation of an indictment, be proved beyond a reasonable doubt. *Davis* v. *State* (1908) 134 Wis. 632; *State* v. *Keeland* (1909) 39 Mont. 506; *Wade* v. *State* (1912) 11 Ga. App. 411. This rule has been carried in one state to such an extreme that the court refuses to take judicial notice of the location of towns within the county. See *Wade* v. *State, supra.* While it is of the very essence of the defendant's guilt that the crime charged should have been committed within the state which by law declares it a crime, Story, Conflict of Laws (8th ed.) § 620; see *People* v. *Martin* (N. Y. 1902) 38 Misc. 67, the venue is separate and distinct from the determination of his guilt, *Brunson* v. *State* (1910) 4 Okla. Crim. 467, and need be established solely for the purpose of showing the jurisdiction of the particular court. *Warrace* v. *State* (1891) 27 Fla. 362; *People* v. *McIntosh* (1909) 242 Ill. 602; see dissenting opinion by Sedgwick J., *Union Pac. R. R. Co.* v. *State* (1911) 88 Neb. 547. Moreover, the reasons which the common law assigned for requiring proof of guilt beyond a reasonable doubt, 1 Wharton, Criminal Evidence (10th ed.) § 1; but see 4 COLUMBIA LAW REVIEW 356, obviously do not apply to the proof of the court's jurisdiction. See *Wilson* v. *State* (1896) 62 Ark. 497. No injustice, therefore, can be done the defendant in a criminal prosecution any more than in a civil action by allowing proof of jurisdiction by a preponderance of

evidence, and this view is sustained by the decided weight of authority. *Cox* v. *State* (1889) 28 Tex. App. 92; *Nichols* v. *State* (1912) 102 Ark. 266; *State* v. *Meyer* (1907) 135 Iowa 507.

DOMESTIC RELATIONS—DIVORCE—SUPPORT OF CHILD.—The plaintiff deserted her husband, taking their minor child with her. She brings this action to recover the money expended to support the child subsequent to the divorce granted to the husband on the grounds of desertion, in which no disposition was made of the child. *Held,* that since the financial means of the husband were so much greater than the plaintiff's, she could recover. *White* v. *White* (Mo. 1913) 154 S. W. 872.

The primary obligation to support children rests upon the father. *Young* v. *Young* (1907) 28 Oh. Circ. Ct. 179. Correlative to this duty, however, is the right to the society and services of the child. *Burritt* v. *Burritt* (N. Y. 1859) 29 Barb. 124. The father need support his children only in the home which he has furnished, *Hyde* v. *Leisenring* (1895) 107 Mich. 490, and when a wife deserts that home, taking her infant child with her, the law implies no promise to pay for the support, unless the child has been abandoned by the father. *Ramsey* v. *Ramsey* (1889) 121 Ind. 215. In paying for the maintenance she has only discharged a duty which she has voluntarily assumed by taking the child into her custody, *Christoff* v. *Christoff* (1892) 6 Oh. Circ. Ct. 512, and the father's failure to demand the custody raises no implication in favor of the plaintiff. *Baldwin* v. *Foster* (1885) 138 Mass. 449; *Glynn* v. *Glynn* (1900) 94 Me. 465. A subsequent divorce does not of itself in any way affect the question, *Fitler* v. *Fitler* (1859) 33 Pa. 50; *Ramsey* v. *Ramsey, supra,* except in a few jurisdictions where the duty of support falls upon the culpable party, irrespective of the award of custody. *Christoff* v. *Christoff, supra; Pretzinger* v. *Pretzinger* (1887) 45 Oh. St. 452. To allow a recovery by the wife on the grounds of benefit to the child, as in the principal case, seems to confuse the issues, since the question is not the future disposition of the child, but reimbursement for benefits already conferred. See *Fulton* v. *Fulton* (1895) 52 Oh. St. 229, 235.

FRAUD—RIGHT OF ACTION AFTER ASSIGNMENT OF CONTRACT RIGHTS.—The plaintiff entered into a contract for the purchase of certain real estate from the defendant, and then assigned his interest therein to his wife. After performance of the contract the plaintiff discovered misrepresentations and brought suit for damages. *Held,* two judges dissenting, the action could be maintained. *Fox* v. *Hirschfield* (N. Y. 1913) 157 App. Div. 264.

The right to assign a chose in action, which was not sanctioned under the early common law, has been to-day generally accorded by statute, see 12 COLUMBIA LAW REVIEW 460, and as the intention of the parties is allowed to prevail, an assignment may be implied from the circumstances surrounding a transaction. *Comeggs* v. *Vasse* (1824) 1 Pet. 193. In some jurisdictions all rights of action for torts are assignable, *Gray* v. *McAllister* (1872) 50 Ia. 497, although the more generally accepted rule limits assignability of tort actions to those for injury to property. *Bennett* v. *Woolfolk* (N. Y. 1894) 80 Hun 390. It would seem that a cause of action at law for damages for fraud resulting in a property loss was such a tort, see *Dahms* v. *Sears* (1885) 13 Ore. 47, but some courts, influenced by the fact that the circum-

stances giving rise to the action at law often give an election to file a bill in equity to set aside the transaction, and that the mere right to file a bill in equity for fraud is not assignable, *Posser* v. *Edmonds* (1835) 1 Younge & Collyer 481, have held that no right of action for fraud can be assigned. *Smith* v. *Thompson* (1892) 94 Mich. 381. In New York, however, the rule appears to be that the cause of action at law is assignable, independently of other rights. *Graves* v. *Shiel* (N. Y. 1870) 58 Barb. 349. On the other hand, there is no doubt this remedy would not pass as an incident to a transfer of the specific property, *Kennedy* v. *Benson* (C.C. 1893) 54 Fed. 836; *Tyson* v. *Ranney* (1895) 89 Wis. 518; *cf. Dickinson* v. *Burrel* (1866) L. R. 1 Ex. 337, and though it generally carries the same measure of damages as a contract action, *Krum* v. *Beach* (1884) 96 N. Y. 398; see 13 COLUMBIA LAW REVIEW 82, would probably not be transmitted by an assignment of contract rights, *cf. Sibbald's Estate* (1852) 18 Pa. 249, but would require a specific mention. *Cf. Metropolitan etc. Co.* v. *Fuller* (1891) 61 Conn. 252.

HUSBAND AND WIFE—JOINT CHOSES IN ACTION—OWNERSHIP.—The defendant sold land which was his in his own right, his wife joining in the conveyance, and took back a mortgage payable to himself and to his wife, whom he survived. *Held,* the entire mortgage was vested in him. *Wegmann* v. *Kress* (Sup. Ct. 1912) 141 N. Y. Supp. 525.

Choses belonging to husband and wife, like other joint obligations, see Clark, Contracts 382, went to the survivor at common law; *Draper* v. *Jackson* (1820) 16 Mass. 479; *Johnson* v. *Lusk* (Tenn. 1868) 6 Cold. 113; but only if the husband had not during his lifetime manifested an intention that he, not his wife, should take. *Pile* v. *Pile* (Tenn. 1880) 6 Lea. 508. Where, however, statutes have freed the wife's choses in action from her husband's interference, it would seem that the rights of the parties should be governed entirely by intention. In absence of evidence distinctly pointing to any particular intent, most jurisdictions have adopted a stereotyped interpretation, and considered them variously as tenants in common, *Matter of Albrecht* (1892) 136 N. Y. 91; *Abegg* v. *Hirst* (1909) 144 Ia. 196; *Luttermoser* v. *Zeuner* (1896) 110 Mich. 186, or by entirety, *Fiedler* v. *Howard* (1898) 99 Wis. 388; see 1 COLUMBIA LAW REVIEW 490. In a few states, however, a distinction is drawn where the husband furnishes the entire consideration, the court interpreting such a transaction as a retention of full rights by the husband, and a gift to the wife taking effect at his death, in case he has refrained from exercising them. *West* v. *McCullough* (N. Y. 1908) 123 App. Div. 846, aff'd. 194 N. Y. 518; *Parry's Estate* (1898) 188 Pa. 33. If the wife's release of dower in the principal case, however, were considered as furnishing part of the consideration, see *Young's Estate* (1895) 166 Pa. 645; *Holmes* v. *Winchester* (1882) 133 Mass. 140, the decision would be unsound in theory; it is supported, however, on the facts, by authority in its own state. *Wilcox* v. *Murtha* (N. Y. 1899) 41 App. Div. 408; *Matter of Rappelje* (N. Y. 1910) 66 Misc. 414.

HUSBAND AND WIFE—RIGHT OF HUSBAND TO ENTER WIFE'S HOME.—The deceased had been living apart from his wife, and while attempting to enter her home, where they had formerly lived, he was killed by the defendant whom she had called to her aid. *Held,* that, under a statute conferring upon a wife the sole control of her property, she

had the right to exclude her husband from her home. *State* v. *Sinclair* (Mo. 1913) 157 S. W. 339.

The development of the modern independent position of woman and her emancipation from the rigorous restrictions of the old common law has been marked in all the United States by statutes which seem peculiarly adaptable to divergent interpretations; and lacking, as it does, the co-ordinating influence of common law principle, the result is a chaotic variety of decisions. See *Ball* v. *Paquin* (1905) 140 N. C. 83. Since the control which the husband exercised over the person of his wife has been almost entirely abrogated, Queen v. Jackson, L. R. [1891] 1 Q. B. D. 671, his right to enter her home would appear to depend upon his rights in her property. If the wife's property is under the husband's management, see *Brown* v. *Brown* (1884) 61 Tex. 56, or if it is merely relieved from liability for his debts, *Schindel* v. *Schindel* (1858) 12 Md. 294, it would seem that his right of ingress and egress was preserved as an incident to his marital rights, *State* v. *Jones* (1903) 132 N. C. 1043, and would not be forfeited by his merely living apart. See *Love* v. *Moynehan* (1855) 16 Ill. 277. Where, however, it is held that a married woman is sufficiently independent to have a separate domicile, *Shute* v. *Sargent* (1892) 67 N. H. 305, and to contract respecting her separate estate as freely as though unmarried, *Rice, Stix & Co.* v. *Sally* (1903) 176 Mo. 107, it would appear to be but a logical step that whatever tenancy a husband might have in his wife's home, see *Rowe* v. *Kellogg* (1884) 54 Mich. 206, could be terminated at her will. *Cook* v. *Cook* (1899) 125 Ala. 583. Nevertheless, in behalf of domestic stability, see *Manning* v. *Manning* (1878) 79 N. C. 293, there seems to be some justification for holding that it was not the intent of the legislature that such a power should be granted either to the husband or to the wife. *Walker* v. *Reamy* (1860) 36 Pa. 410.

INJUNCTIONS—CONTINUING NUISANCES—BALANCING INJURIES.—The defendant company, which owned and operated a mill representing an outlay of a million dollars and employing 500 operatives, polluted a stream upon which the complainant was a lower riparian owner, causing him damage which was assessed at $100 a year. In a suit for a restraining order the court *held,* that an injunction would lie as a matter of right, and that the injuries of each party would not be balanced. *Whalen* v. *Union Bag & Paper Co.* (N. Y. 1913) 101 N. E. 805. See Notes, p. 635.

INSURANCE—DELAY IN FORWARDING APPLICATION—TORT LIABILITY.—An insurance agent neglected to send in an application for life insurance until after the death of the applicant, who was a good risk, had paid all required fees, and was not responsible for the delay. His personal representative sued the insurance company in tort for the negligence of its agent. *Held,* recovery should be granted. *Duffy* v. *Bankers' Life Ass'n* (Iowa 1913) 139 N. W. 1087.

It is well settled that no contract of insurance is created by the failure of an insurance company to reject an application for a policy within a reasonable time. *More* v. *N. Y. Bowery Fire Ins. Co.* (1892) 130 N. Y. 537. The doctrine that the company may none the less be liable in tort for such a delay is new, and was first adopted in *Boyer* v. *Hail Ins. Co.* (1912) 86 Kan. 442, although its correctness seems

to have been suggested in *Walker* v. *Farmers' Ins. Co.* (1879) 51 Iowa 679. It rests on the theory that an insurance company assumes with its charter a legal duty either to grant insurance to an applicant within a reasonable time, or to inform him of its refusal, and give him an opportunity to apply elsewhere; a theory which is in line with the modern tendency in legislation to treat insurance companies as quasi-public service corporations because of their great social importance. Ohio Code of 1910, §§ 615-673, 9339-9409; Gephart, Insurance and the State, Chap. II. A practical argument is based on the fact that insurance companies customarily require a deposit to be made with the application, and ordinarily date the policy as of the same day on which the application was signed. It is urged that the company owes a legal duty not to prolong unnecessarily this period for which it is exacting a premium without incurring any risk. Once we admit this duty of the insurance company, it is obvious that it is liable for the negligence of any agent in failing to send in an application which he was empowered to receive.

JUDICIAL SALES—CONFIRMATION—INADEQUACY OF PRICE.—The complainant objected to the confirmation of an execution sale of mortgaged property on the ground that the property went for an inadequate price. *Held,* objection overruled. *Knickerbocker Trust Co.* v. *Carteret Steel Co.* (N. J. Eq. 1912) 86 Atl. 55.

Because of its power to control its own judgments, it lies within the discretion of a court to set aside judicial sales at the instance of any person who has been injured thereby. *Goodell* v. *Harrington* (1879) 76 N. Y. 547. In England, a judicial sale will be set aside before confirmation upon the offer of a sufficient advance over the sum received. Wiltsie, Mortgage Foreclosures (3rd ed.) § 626; *In re Jones's Settled Estates* (1860) 29 L. J. [N. S.] Ch. 139; but see *Ballentyne* v. *Smith* (1907) 205 U. S. 285. But the prevailing view in the United States is that, in the absence of fraud or irregularities, mere inadequacy of price will not justify a court in setting aside a judicial sale, unless the inadequacy is so great as to shock the conscience. *Ballentyne* v. *Smith, supra; Abbott* v. *Beebe* (1907) 226 Ill. 417. The theory is that a grossly inadequate price betokens fraud, which is always a sufficient ground to justify a court in setting aside a sale. Pomeroy, Equity Jurisprudence, § 927. At times, courts have ignored this rule, and held that no price is inadequate. *O'Callaghan* v. *O'Callaghan* (1878) 91 Ill. 228. But most courts either apply the rule, *Lankford* v. *Jackson* (1852) 21 Ala. 650; *James* v. *Nease* (Texas 1902) 69 S. W. 110; or, in cases of great inadequacy, they are quick to seize on other circumstances impeaching the fairness of the transaction as a pretext for setting aside the sale. *Schroeder* v. *Young* (1895) 161 U. S. 334; *O'Donnell* v. *Lindsay* (N. Y. 1873) 7 Jones & Spencer 523.

LANDLORD AND TENANT—COVENANT FOR EXTENSION—HOLDING OVER.—The lessee under a lease giving him an optional extension upon thirty days' notice before the expiration of his term, remained in possession thereafter, paying rent. The landlord attempted to hold him for rent for the period of the extension. *Held,* the lessor could recover. *Kean* v. *Story & Clark Piano Co.* (Minn. 1913) 140 N. W. 1031.

When a covenant in a lease provides for a renewal at the option

of the tenant, the view is generally taken that the parties intend some affirmative act on his part to express his election, so that actual notice is generally essential. *Shamp* v. *White* (1895) 106 Cal. 220; *Andrews* v. *Marshall Creamery Co.* (1902) 118 Ia. 595; *cf. Kollock* v. *Scribner* (1897) 98 Wis. 104. If, however, a higher rental is provided for by the lease, *Long* v. *Stafford* (1886) 103 N. Y. 274; see *Stone* v. *St. Louis Stamping Co.* (1892) 155 Mass. 267, or if the tenant gives notice after the appointed period, *Sheppard* v. *Rosenkraus* (1901) 109 Wis. 58, there is no difficulty in treating a holding over with the payment and acceptance of the appropriate rent as a renewal. But if there be a covenant for an extension, rather than for a renewal of the term, a mere holding over is deemed a sufficient indication of the tenant's exercise of his privilege. See *Terstegge* v. *First German Mut. Benev. Soc.* (1883) 92 Ind. 82. So far-reaching is this presumption of law that it is often employed to override an express stipulation of notice. *Probst* v. *Rochester Steam Laundry Co.* (1902) 171 N. Y. 584; *Hotel Allen Co.* v. *Estate of Allen* (1912) 117 Minn. 333. But, on the theory that the terms of the option indicate how the lessee may avail himself thereof, other authorities reach the more reasonable conclusion that a mere naked holding over gives rise to no presumption of his election, *Cooper* v. *Joy* (1895) 105 Mich. 374; *Murtland* v. *English* (1906) 214 Pa. 325, achieving the far different practical result of holding the lessee as tenant from year to year. See *Haynes* v. *Aldrich* (1892) 133 N. Y. 287.

MASTER AND SERVANT—APPLIANCES—DUTY OF SERVANT TO INSPECT.—A servant sustained personal injuries due to the breaking of a defective ladder furnished by his master. The trial court instructed the jury that if the servant had equal opportunity with the master to discover the defect in the ladder, recovery should be denied. *Held,* the instruction was erroneous. *East Tennessee Telephone Co.* v. *Jeffries* (Ky. 1913) 154 S. W. 1112.

The rule here repudiated was originally laid down in broad language in cases where the appliances were simple and of such a character that the defects in them must have been obvious to the servant. *Priestley* v. *Fowler* (1837) 3 M. & W. 1; *Nourse* v. *Packard* (1885) 138 Mass. 307. The doctrine remains in full force in some jurisdictions, and is applied to defects in places of work as well as in tools. *Manchester Mfg. Co.* v. *Polk* (1902) 115 Ga. 542; *Kinney* v. *Corbin* (1890) 132 Pa. 341. In other jurisdictions, the rule has been limited to cases where the defects were in simple appliances, the condition of which is best known to the servants using them. *Clarke* v. *Holmes* (1862) 7 Hurlst. & Norm. 937; *Marsh* v. *Chickering* (1886) 101 N. Y. 396. By the weight of authority, however, this rule has been repudiated, and the servant is permitted to rely absolutely on the supposition that the master has furnished safe appliances. *Texas & Pacific Ry.* v. *Archibald* (1898) 170 U. S. 665; *Magee* v. *North Pacific R. R. Co.* (1889) 78 Cal. 430; *Pfisterer* v. *J. H. Peter & Co.* (1904) 117 Ky. 501. The courts which deny this absolute liability of the master contend that he should not be required to exercise more care on behalf of the servant than the servant does for himself. *Priestley* v. *Fowler, supra.* But since knowledge of the danger is an essential element of assumption of risk, 12 COLUMBIA LAW REVIEW 629, it would seem that the mere fact that the servant had equal opportunity with his master to discover the danger would be immaterial in deciding whether the servant assumed the risk.

MASTER AND SERVANT—FELLOW SERVANT DOCTRINE—VICE PRINCIPALSHIP.—The plaintiff was injured through the gross negligence of the defendant's foreman, who was at that moment doing work similar to that of the plaintiff. *Held,* the foreman was not a fellow servant of the plaintiff. *United Iron Works Co.* v. *Bowling* (Ky. 1913) 156 S. W. 125.

Of the several theories of fellow-servant and vice principal propounded throughout this country, the one most widely accepted is the doctrine of dual capacity, 2 Labatt, Master & Servant 1611, which takes as the test the character of the work being done by the fellow servant, and will permit a recovery only if he was at that moment performing a non-delegable duty of the master. *Crispin* v. *Babitt* (1880) 81 N. Y. 516; *B. & O. R. R. Co.* v. *Baugh* (1892) 149 U. S. 368. This doctrine has never found favor in Kentucky, the jurisdiction of the principal case, see *I. C. R. R.* v. *Coleman* (Ky. 1900) 59 S. W. 13, 14, which is committed, *I. C. R. R.* v. *Venable* (Ky. 1901) 63 S. W. 35, 37, to the different department doctrine, *Illinois Steel Co.* v. *Bauman* (1899) 178 Ill. 351, based on the very reasonable explanation that two employees situated in different departments have no opportunity of urging mutual diligence one upon the other. *I. C. R. R.* v. *Hilliard* (1896) 99 Ky. 684, 688; see *Scudder* v. *Woodbridge* (1846) 1 Ga. 195. When, however, the two servants are engaged in the same department, the Kentucky courts invoke the superior servant doctrine, first enunciated in Ohio, *Little Miami R. R. Co.* v. *Stephens* (1851) 20 Oh. 415, and made the subject of legislation in several states, see Laws of Ark. (1904) 6658-9, which has regard only for the relative rank of the servant causing the injury, and is never concerned with the character of the work he may be doing at that moment; but they add the odd qualification that the master is liable only if the superior servant was guilty of gross negligence. *Board* v. *Ry. Co.* (Ky. 1902) 70 S. W. 625; *L. & N. R. R. Co.* v. *Moore* (1886) 83 Ky. 675. This peculiar and confused doctrine, see *L. C. & L. Ry. Co.* v. *Caven's Admr.* (Ky. 1873) 9 Bush. 559, is the basis of the decision in the principal case.

MUNICIPAL CORPORATIONS—LIMITATION OF ACTIONS.—The plaintiff was injured by an employee of the defendant, a municipal corporation conducting a private business, and brought suit without having given notice of his claim within the time provided by the statute. *Held,* one judge dissenting, the statute did not apply. *Henry* v. *City of Lincoln* (Neb. 1913) 140 N. W. 664.

While there is no rule at common law making it necessary as a condition precedent to a right of action against a municipal corporation that a claim should be first presented to the common council, *Green* v. *Town of Spencer* (1885) 67 Ia. 410, yet, to-day, it is often provided by statute that no action shall be maintained until the claim has been first presented. *Huntington* v. *City of Calais* (1909) 105 Me. 144; *O'Donnell* v. *New London* (1902) 113 Wis. 292. The courts have not generally been inclined to hold these provisions applicable to actions for personal torts unless they are specifically included. *Brown* v. *Salt Lake City* (1908) 33 Utah 222; *McGaffin* v. *City of Cohoes* (1878) 74 N. Y. 387. Inasmuch as the tortious liability of a municipality for damages sustained in consequence of its negligence in performing a governmental duty is only statutory, *Hill* v. *Boston* (1877) 122 Mass. 344; 4 Dillon, Municipal Corporations § 1613, the legislature clearly has power to limit as it deems proper the rights of any claim-

ant to recover, *Crocker* v. *City of Hartford* (1895) 66 Conn. 387; *Cunningham* v. *Denver* (1896) 23 Colo. 18, and when such limitation is prescribed, a strict compliance with its terms is held by the courts to be a condition precedent. *Bernreither* v. *City of New York* (N. Y. 1908) 123 App. Div. 291, affd. 196 N. Y. 506; *Condon* v. *City of Chicago* (1911) 249 Ill. 596. If, however, the tort results from the municipality's negligence while engaged in its private capacity, it is civilly liable like an individual, *Esberg Cigar Co.* v. *Portland* (1899) 34 Ore. 282; 4 Dillon, Municipal Corporations § 1665, and therefore not subject to the provisions of the statute. *Kelly* v. *Faribault* (1905) 95 Minn. 293. But where the statute, as in the principal case, applies to all claims without restriction, it would seem that the intention of the legislature was to embrace this liability within its terms.

MUNICIPAL CORPORATIONS—NEGLIGENCE—WHEN A QUESTION OF LAW.—In an action against a municipal corporation for an injury caused by slight defects in a sidewalk, the lower court directed a verdict for the defendant. *Held,* the question of the defendant's negligence should have gone to the jury. *Gibbs* v. *Village of Girard* (Ohio 1913) 102 N. E. 299.

It has been frequently determined in American courts that a municipality, when acting in its private capacity, is not an insurer, but, having the same status as a private corporation, is only liable for failure to use due care, Elliot, Municipal Corporations (2nd ed.) § 326; *Beltz* v. *City of Yonkers* (1895) 148 N. Y. 67, although several New England states have consistently held that a suit cannot be maintained unless clearly authorized by statute. See *Hill* v. *Boston* (1877) 122 Mass. 344. The presence of negligence has usually been regarded as a question of mixed law and fact, Beven, Negligence (3rd ed.) 131; *Fuller* v. *Citizens' Nat. Bank* (1882) 15 Fed. 875, but the sufficiency of the plaintiff's evidence to justify a verdict for him is generally held a question of law. *Ketterman* v. *Dry Fork R. R.* (1900) 48 W. Va. 606; *Pleasants v. Fant* (1874) 22 Wall. 116; but see *Way* v. *Illinois Central R. R.* (1872) 35 Ia. 585. It is this rule, rather than any doctrine in the law of municipal corporations, as the principal case assumes, which affords the basis for the decisions in which defects similar to those in the principal case were held not to constitute negligence on the part of the municipality. *Witham* v. *Portland* (1881) 72 Me. 539; *Grant* v. *Enfield* (N. Y. 1896) 11 App. Div. 358. The principal case is in conflict with these decisions, therefore, only in its adherence to the "scintilla rule" of evidence, according to which the slightest particle of evidence in support of the plaintiff's case compels its submission to the jury. Thompson, Trials (2nd ed.) § 2246 *et seq.* This rule, however, with the exception of the jurisdiction of the principal case, *Ellis* v. *Ohio Life Ins. Co.* (1855) 4 Ohio St. 628, has been generally repudiated. *Ryder* v. *Wombwell* (1868) L. R. 4 Ex.* 32; *Bartelott* v. *International Bank* (1887) 119 Ill. 259.

NEGOTIABLE INSTRUMENTS—DEFENSES—INTOXICATION.—In a suit by a holder in due course of a promissory note, the defendant pleaded his complete intoxication at the time of execution. *Held,* the defense was good. *Green* v. *Gunsten* (Wis. 1913) 142 N. W. 261.

The rule that a person *non compos mentis* cannot enter into a contract, 1 Parsons, Contracts (9th ed.)* 383; see *Dexter* v. *Hall* (1872) 15 Wall. 9, includes as well the case of a person completely intoxicated.

See *Taylor* v. *Purcell* (1895) 60 Ark. 606; *Johns v. Fritchey* (1873) 39 Md. 258; *contra, State Bank* v. *McCoy* (1871) 69 Pa. 204. The alleged contract in the principal case, therefore, was void in its inception, and the defense should be good even against the holder in due course. See *Johnson* v. *Sutherland* (1878) 39 Mich. 579; *cf. McClain* v. *Davis* (1881) 77 Ind. 419; see *Caulkins* v. *Fry* (1868) 35 Conn. 170. It has been argued, however, that § 57 of the Uniform Negotiable Instruments Law, N. Y. Laws of 1909, ch. 43, § 96, abolishes all real defenses. Crawford, Negotiable Instruments (3rd ed.) 71 n.b. It would seem improbable, however, that the framers of the law intended to make that a contract which was void in its inception, see *Alexander* v. *Hazelrigg* (1906) 123 Ky. 677, and it is significant also that the section which is relied on to accomplish that result, speaks only of defects of title. Moreover, if the holder in due course took free of all defenses, it would seem unnecessary to impose the obligation of warranty upon an indorser by § 66. In the jurisdiction of the principal case the preservation of real defenses is secured by a modification in the state statute. Wis. St. 1911 §§ 1676-25, 1676-27. Many courts, however, influenced rather by policy than by principle, have disallowed the defense of intoxication, in order to place the loss upon the party whom they consider at fault, and to protect the free circulation of commercial paper. *State Bank* v. *McCoy, supra; Smith* v. *Williamson* (1892) 8 Utah 219. There is also a curious middle ground which allows the intoxication of the maker to prevent, in effect, the status of a holder in due course, since it opens a note in the hands of any holder to the defense of fraud or lack of consideration, without itself constituting a defense. *Moore* v. *Hershey* (1879) 90 Pa. 196; see *Wirebach* v. *Bank* (1879) 97 Pa. 543.

PATENTS—ACCOUNTING FOR PROFITS—BURDEN OF PROOF.—The defendant was using a machine and a process in the manufacture of wire glass which infringed the complainant's patent. In a suit for the infringement, the court awarded an accounting for profits, approving the rule that when the complainant proves that apportionment of profits is impossible he may recover the entire profits, though not arising wholly from the use or sale of the patented article or process. *Schmertz Wire Glass Co.* v. *Western Glass Co.* (D. C. N. D. Ill. 1913) 203 Fed. 1006. See Notes, p. 628.

PATENTS—SALE OF PATENTED ARTICLE—RIGHT TO REGULATE RESALE PRICE.—Patented articles were sold to jobbers in packages upon which was printed: "Notice to Retailer. This size package . . . is licensed by us for sale and use at a price not less than one dollar. Any sale in violation of this condition . . . will constitute an infringement, . . . and all persons so selling . . . will be liable to injunction and damages. A purchase is an acceptance of this condition. All rights revert to the undersigned in the event of violation." *Held,* the restriction was void. *Bauer & Cie* v. *O'Donnell* (1913) 33 Sup. Ct. Rep. 616. See Notes, p. 632.

PERSONAL PROPERTY—CONFUSION OF GOODS.—The defendant, having by mistake received the plaintiff's pig iron and mixed it with similar iron of its own, refused to return plaintiff's iron, asserting that it was unable to identify such iron. *Held,* one judge dissenting, the defendant was guilty of conversion. *Samuel et al.* v. *Holbrook, Cabot & Rollins Corp.* (App. Div. 1913) 141 N. Y. Supp. 275. See Notes, p. 630.

PERSONAL PROPERTY—LIFE ESTATE—SECURITY TO REMAINDERMAN.—A testator bequeathed a residuary life interest in personalty to his widow, remainder to his son. *Held,* that since she was a non-resident, she was not entitled to possession without giving security to protect the remainderman's interest. *In re Mercantile Trust Co.* (App. Div. 1913) 141 N. Y. Supp. 460.

Although in early equity practice a remainderman of personalty was always entitled to security from the life tenant, *Case 280* (1695) 2 Freeman Chancery* 206, the only relief which he can now claim as a matter of course is an inventory. *Leeke* v. *Bennett* (1737) 1 Atk. 470; *Langworthy* v. *Chadwick* (1838) 13 Conn. 42. When, however, there is danger that a life tenant already in possession of the property is about to waste or secrete it, the remainderman, by a bill *quia timet,* can compel him to give security. *Lyde* v. *Taylor* (1850) 17 Ala. 270; *McNeill* v. *Bradley* (N. C. 1860) 6 Jones Eq. 41. When the estate is in the course of distribution, a life tenant is entitled to possession of a specific bequest as a matter of right, and can be compelled to give security only under circumstances indicating danger to the property. *Mortimer* v. *Moffat* (Va. 1810) 4 Hen. & Mun. 503; see 5 COLUMBIA LAW REVIEW 552. If, however, the bequest is residuary, or if it consists of articles that must be consumed in the using, *Covenhoven* v. *Shuler* (N. Y. 1830) 2 Page Ch. 122, it is the duty of the executor, on the theory of a continuing trust, to sell the property and invest the proceeds, paying the income to the life tenant and preserving the *corpus* for the remainderman. *Livingston* v. *Murray* (1877) 68 N. Y. 485; see 5 COLUMBIA LAW REVIEW 552. He is, none the less, often allowed to turn over the estate to the life tenant as in the principal case, but in such event the remainderman is entitled to have his interest protected by a bond from the person given possession, even in the absence of peculiar circumstances of danger. *Matter of Lowery* (N. Y. 1896) 19 Misc. 83; *In the Matter of Roffo* (N. Y. 1900) 51 App. Div. 35; *contra, Fiske* v. *Cobb* (1856) 72 Mass. 144.

PLEADING AND PRACTICE—CONTRIBUTORY NEGLIGENCE—ADMISSION OF NEGLIGENCE.—In an action for personal injuries the defendant pleaded a general denial and then alleged contributory negligence. *Held,* this was not an admission of negligence on the part of the defendant, which would limit the issues to that of the plaintiff's negligence. *Clemens* v. *St. Louis & S. F. R. R. Co.* (Okla. 1913) 131 Pac. 169.

Since the gist of an action for negligence is an injury of which the defendant's negligence was the proximate cause, *Grand Trunk Ry. Co.* v. *Ives* (1892) 144 U. S. 408, essentially the averment of freedom from contributory negligence is of necessity involved in the averment setting out that the injury was occasioned by the defendant's negligence. See *Lee* v. *Troy Gas Light Co.* (1885) 98 N. Y. 115, 119. Consequently, a plea of contributory negligence is no more in substance than a denial of a material allegation of fact in the complaint. *MacDonell* v. *Buffum* (N. Y. 1864) 31 How. Pr. 154. Those jurisdictions which put the burden on the plaintiff of proving freedom from contributory negligence, Burdick, Law of Torts (2nd ed.) 432, adopt this view of the defense and admit evidence of it under the general denial. *MacDonell* v. *Buffum, supra.* In such a jurisdiction this plea, standing alone, would admit negligence in the defendant by mere failure to deny, but when joined with a general denial this would be cured and the only objection which might be raised against the answer is that of surplusage. See *Ross* v. *Neal* (Ky. 1828) 7 T. B. Monroe's Rep. 407. A great many jurisdictions, however, make contributory

negligence an affirmative defense, 10 COLUMBIA LAW REVIEW 266, partaking of the nature of a plea in confession and avoidance. *Watkinds* v. *So. Pac. R. R. Co.* (1889) 38 Fed. 711; *Linforth* v. *San Francisco Electric Co.* (1909) 156 Cal. 58. Such a plea obviously admits negligence on the part of the defendant and is therefore inconsistent with the general denial. *City of Plymouth* v. *Fields* (1890) 125 Ind. 323. Under the code practice, however, there would be no objection to the joinder of the two pleas. *Millan* v. *So. Ry. Co.* (1898) 54 S. C. 485; see *Leavenworth Light & Heating Co.* v. *Waller* (1902) 65 Kan. 514. The principal case, therefore, although adopting the view that contributory negligence is a matter of denial, would be upheld under either theory.

PLEADING AND PRACTICE—GENERAL DENIAL—ESTOPPEL.—Under a general denial in an action of conversion the defendant introduced evidence to show that the plaintiff was estopped from asserting ownership. *Held,* the evidence was admissible since an estoppel need not be specially pleaded. *Feinberg* v. *Allen* (1913) 208 N. Y. 215.

The common law distinction between a technical estoppel, as by record or deed, which the defendant was compelled to plead specially, and an estoppel *in pais,* which could be proven under a general denial, *Hostler* v. *Hays* (1853) 3 Cal. 303; *Freeman* v. *Cooke* (1848) 2 Excheq.* 654, seems to be based on the fact that an estoppel *in pais* is of an equitable nature, see Bigelow, Estoppel 603, and therefore the defendant should not be precluded from its use by a technicality. In most code states, however, this distinction has been swept away, and under modern statutory procedure all estoppels are treated as new matter. *Wood* v. *Ostrand* (1867) 29 Ind. 177; *McQueen* v. *Bank of Edgemont* (1906) 27 S. Dak. 378. The New York doctrine, however, which is applied in the principal case, permits the admission of estoppels *in pais* under the general denial, in the same manner as the defendant might show title in a stranger, and does not require them to be pleaded specially. *Terry* v. *Buek* (N. Y. 1899) 40 App. Div. 419; see *Rogers* v. *King* (N. Y. 1873) 66 Barb. 495. The inherent characteristics of an estoppel give rise to this conflict of authority. Logically, all new matter must be affirmatively pleaded, but when the defendant sets up an estoppel he does not deny the facts, nor does he necessarily avoid the conclusion by new matter. If, therefore, this rule is strictly applied, an estoppel which acts as a bar to a cause of action which once existed must be pleaded, while one which prevented the existence of a cause of action could be proved under a general denial, *Greenway* v. *James* (1864) 34 Mo. 326, and, as in the principal case, the estoppel showing that the plaintiff did not have title when the goods were converted could be introduced as evidence. The result of this rule would be to draw a technical distinction which would in some cases act harshly, but it would, at least, produce certainty and conformity to the well-established rules of pleading.

QUASI-CONTRACTS—ELECTION OF REMEDIES—DAMAGES.—The defendant set up a counterclaim in quasi-contract for the value of securities wrongfully sold by the plaintiff. *Held,* the set-off should include merely the proceeds of the sale by the plaintiff, and not the reasonable value of the securities. *Heinze* v. *McKinnon* (C. C. A. 1913) 205 Fed. 366.

The essential distinction between an action in conversion and one in quasi-contract seems to be that the former is based on an obligation to recompense the injured party for losses suffered, the latter, on

the obligation to relinquish benefits received, by reason of the defendant's assumption of ownership over the plaintiff's chattel. Since in trover the damage to the owner accrues by the act of conversion, his loss must be measured at that very time and cannot be affected by what occurs subsequently. *Wehle* v. *Haviland* (1877) 69 N. Y. 448; *Ingram* v. *Rankin* (1879) 47 Wis. 406. But in a quasi-contractual action the owner has a right to follow his property in the hands of the original wrongdoer and to determine at what period the obligation to account for benefits received shall accrue. If the defendant sells the plaintiff's goods, the latter may elect to consider him an agent, and compel him to hold the amount realized from the sale to the plaintiff's use. *Lamine* v. *Dorrell* (1705) 2 Ld. Raym. 1216; see *Goodwin* v. *Griffis* (1882) 88 N. Y. 629, 638. But when the defendant retains or consumes the goods converted, in many jurisdictions, the plaintiff may elect to treat him as a vendee for a reasonable purchase price assumed to be the value of the goods at the time of conversion. *Terry* v. *Munger* (1890) 121 N. Y. 161; *Walker* v. *Ry.* (1910) 67 W. Va. 273; but see *contra, Jones* v. *Hoar* (Mass. 1827) 5 Pick. 285. It would seem that the fiction of a sale to the wrongdoer should be raised immediately on his assumption in any way of ownership over the chattel, and that he should not be able to deprive the plaintiff of an existing remedy by alienating it, see *Anderson* v. *Bank* (1896) 5 N. D. 451, 458; *Goodwin* v. *Griffis, supra,* since the beneficent fiction whereby a cause of action in conversion may be turned into one in contract was frankly established to give a better and more convenient remedy to the injured party.

Real Property—Covenant Against Incumbrances—Nature of "Incumbrances".—The plaintiff, a grantee of land from the defendant, sues on a covenant against incumbrances, alleged to have been broken by the existence of an easement incident to the maintenance of a public sewer. *Held,* two judges dissenting, the existence of the easement did not constitute a breach of the covenant. *First Unitarian Society* v. *Citizens' Sav. & Trust Co.* (Ia. 1913) 142 N. W. 87.

The principal case places a public sewer, because of the supposedly beneficial effect of such an easement upon the land made servient thereto, in the same category with a public highway, which is held not to be an incumbrance in Iowa. See *Harrison* v. *Ry. Co.* (1894) 91 Ia. 114; *cf. Stuhr* v. *Butterfield* (1911) 151 Ia. 736. On the ground, however, that an incumbrance exists wherever there is a legal obstruction to the exercise by a grantee of that dominion over the land to which the lawful owner is entitled, the great weight of authority holds that a possible benefit due to the outstanding easement is quite immaterial. *Mackey* v. *Harmon* (1885) 34 Minn. 168; *Tuskegee Land & Secur. Co.* v. *Birmingham Realty Co.* (1909) 161 Ala. 542; *Demars* v. *Koehler* (1898) 62 N. J. L. 203. Except for the few jurisdictions which adopt the rule that knowledge of the easement by the grantee excludes it from the operation of the covenant, see *Howell* v. *Northampton R. R. Co.* (1905) 211 Pa. 284, those courts which hold a highway not an incumbrance do so avowedly upon grounds of public policy; *Huyck* v. *Andrews* (1889) 113 N. Y. 81; *Harrison* v. *Ry. Co., supra;* the weight of authority, moreover, regards a public highway as coming within the general definition of an incumbrance. *Kellogg* v. *Ingersoll* (1806) 2 Mass. 97; *Hubbard* v. *Norton* (1835) 10 Conn. 422. A decision that a public sewer comes within the covenant against incum-

brances would not lead to the flood of litigation which some courts fear would result from a similar holding with respect to a highway, see *Huyck* v. *Andrews, supra,* so that the principal case seems to be an extension of a rule which is, itself, in conflict with sound principle.

REAL PROPERTY—ESTATES BY ENTIRETIES—LIENS OF JUDGMENT CREDITORS OF THE HUSBAND.—The grantee of an estate by entireties by joint deed of husband and wife brought an action to have his title declared free from the liens of judgment creditors of the husband. *Held,* he had acquired a clear title. *Beihl* v. *Martin* (1912) 236 Pa. 519.

Since the common law gave to the husband the control of his wife's property during coverture, he could mortgage or convey an estate by entireties, so long as he did not impair her right of survivorship. *Barber* v. *Harris* (N. Y. 1836) 15 Wend. 615; see *Hall* v. *Stevens* (1877) 65 Mo. 670. This estate, consequently, subject to the wife's right of survivorship, was liable for his individual debts, until the married women's acts deprived him of the sole usufruct. In jurisdictions where husband and wife are regarded under the statute as tenants in common for life with the inalienable right of survivorship, creditors of either may levy on the debtor's estate, and upon sale thereof, the purchaser becomes a tenant in common with the other spouse; and, in the event of the debtor's survival, he acquires the fee. *Hiles* v. *Fisher* (1895) 144 N. Y. 306; *Buttlar* v. *Rosenblath* (1877) 42 N. J. Eq. 651. But where the common law incidents of this estate are preserved, except that the wife has the independent enjoyment of an indivisible share of the usufruct, no levy thereon can be made under a judgment against either spouse individually. *McCurdy* v. *Canning* (1870) 64 Pa. 39; *Schliess* v. *Thayer* (1912) 170 Mich. 395. To subject the right of survivorship, however, to the payment of the husband's debts would not deprive the wife of the right to convey with his consent, since she alone cannot convey, and is, therefore, in no worse position, when he has placed himself where he cannot consent without prejudice to the rights of third parties, than if he had refused his consent. A better solution, since it both preserves the character of the estate and affords protection to creditors, is to grant to creditors of the husband an inchoate lien upon the right of survivorship. *Fleek* v. *Zielhaver* (1887) 117 Pa. 213; see *Cole Mfg. Co.* v. *Collier* (1895) 95 Tenn. 115; *Beach* v. *Hollister* (N. Y. 1875) 3 Hun 519.

TORTS—DAMAGES—INTEREST.—The trial court charged the jury that they might in their discretion allow interest from the date of the destruction of the property as an element of damages. *Held,* this instruction was correct. *Harper* v. *Atlantic Coast Line R. R. Co.* (N. C. 1913) 77 S. E. 415.

Because of the absence of any agreement of the parties to pay it, the common law did not conceive of interest as an element of tort damages, until by statute in England, ch. 42, § 29, 3 & 4 W. 4, the jury was permitted as a matter of discretion to allow it in cases of trover and trespass *de bonis asportatis.* Mayne, Damages (7th ed.) 174, 176. In this country, however, the courts have regarded the nature of the action as the determining factor. Burdick, Torts (2nd ed.) 207. If, on the one hand, the suit is for personal injuries, since the damages are purely speculative, interest forms no part of the judg-

ment. *Western, etc., R. R.* v. *Young* (1888) 81 Ga. 397; *Texas, etc., R. R.* v. *Carr* (1897) 91 Tex. 332; *cf. Washington & Geo. R. R.* v. *Hickey* (1895) 12 App. D. C. 269. On the other hand, in an action for conversion or destruction of property, in which the plaintiff's loss is readily computible, on analogy to cases of liquidated damages in contract, interest is generally included as an element of the damages, as a matter of law, *St. Louis, etc., R. R.* v. *Lyman* (1893) 57 Ark. 512; *Union Pac. R. R.* v. *Ray* (1896) 46 Neb. 750, though some jurisdictions have left it within the discretion of the jury. *Frazer* v. *Bigelow Carpet Co.* (1886) 141 Mass. 126; *Eddy* v. *Lafayette* (1892) 49 Fed. 807. Where the property is merely injured, however, although the amount of the loss is not readily ascertainable, the prevailing view in accord with the principal case, considers it essential in compensating the plaintiff to allow the jury in its discretion to add to the sum representing the plaintiff's actual damage an additional sum, measured by the interest from the date of the tort, to compensate him for the delay. *Wilson* v. *Troy* (1892) 135 N. Y. 96; *cf. Richards* v. *Citizens' Nat. Gas. Co.* (1889) 130 Pa. 37; *contra, N. Y. C. R. R.* v. *Estill* (1893) 147 U. S. 591.

TRANSFER TAX—DEPOSIT UNDER TWO NAMES—SURVIVORSHIP.—Bank accounts stood in the name of "Bank to A, Dr.....B may draw", "A and B. Either or the survivor may draw", and "A and B." After the death of A, his wife, B, resisted payment of the transfer tax assessed against these deposits. *Held,* so much of the deposits as were contributed by the decedent were taxable. *In re Durfee's Estate* (Surr. Ct. 1913) 140 N. Y. Supp. 594.

In determining the time at which the wife acquires her property right in a chose of this character, the intention of the parties will be allowed to prevail. See *Matter of Eysel* (N. Y. 1909) 65 Misc. 432; *West* v. *McCulloch* (N. Y. 1908) 123 App. Div. 846, aff'd. 194 N. Y. 518. In the principal case the parties desired that either depositor might draw money at will until the account was exhausted. This was the wife's vested legal right during her husband's lifetime, and it was changed at his death only by the cutting off of the possibility of his first exercising a similar right. Therefore, inasmuch as a special statute must be most strongly construed against the government, *United States* v. *Wigglesworth* (1842) 2 Story 369; *Matter of Enston* (1889) 113 N. Y. 174, such a transaction seems rather to vest an immediate title than to contemplate the acquisition of property at the time of the husband's death, see *Kelly* v. *Beers* (1909) 194 N. Y. 49, within the meaning of the New York statute taxing transfers of property in anticipation of death or to take effect in possession at the death of the transferror. N. Y. Cons. Laws 1909, Tax Law, § 220, amended 1911, c. 732. The courts, however, have generally approved the rule in the principal case, *Matter of Kline* (N. Y. 1909) 65 Misc. 446; *Matter of Wilkins* (N. Y. 1911) 144 App. Div. 803; *contra, Matter of Stebbins* (N. Y. 1907) 52 Misc. 438, and where it was impossible to determine what part the decedent had contributed, have rested on the presumption that each depositor owned an equal share of the account. *In re Pitou* (1903) 140 N. Y. Supp. 919; *Wetheral* v. *Lord* (N. Y. 1899) 41 App. Div. 413.